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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 218

JOHN CARDILLO,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR CERTIORARI

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Petitioner John Cardillo presents this petition for a rehearing of this Honorable Court's order dated October 14, 1963, denying the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit, and, in support thereof, respectfully shows to this Honorable Court:

Grounds for Rehearing

The petitioner herein prays for a rehearing of the order denying his petition for a writ of certiorari based upon substantial grounds, pursuant to Supreme Court Rules, Rule 58(2). At the outset, the opinion of the Court of Appeals for the Second Circuit in the case at bar is reported below (*United States v. Cardillo*, 316 F. 2d 606) and is printed at pages numbered 21 to 38 inclusive of the "Appendix" in petitioner's original petition for a writ of certiorari.

Circuit Judge Clark, while concurring in the result which unanimously affirmed the District Court, reluctantly did so. It is respectfully submitted that this Court possibly overlooked Circuit Judge Clark's suggestion to this Court that "correction must come from the Supreme Court" (316 F. 2d 606 at 617).

Petitioner and others were prosecuted for interstate transportation of stolen furs, interstate receipt of stolen furs and for conspiracy to do the same. Petitioner was convicted and sentenced to concurrent terms of five years. He is presently free on bail pending final determination by this Court.

On October 21, 1963, this Court reversed a judgment of contempt in the case of *Panico* v. *United States* and directed the Court to hold a full and complete hearing on the question of Panico's sanity. In the *Panico* case, related to *United States* v. *Bentvena*, 319 F. 2d 916, 944 (1963), he was cited for contempt for committing numerous infractions in the courtroom during his retrial before the District Court and a jury. This Court held that he was not afforded an adequate sanity hearing. Moreover, Panico's judgment was reversed by the Court of Appeals for the Second Circuit on the ground that he did not waive his privilege to testify in his own behalf and denial of such privilege to testify required reversal (*United States* v. *Bentvena*, *supra*). Further, on October 21, 1963, this Court decided *Genovese* v. *United States*, wherein the Court ruled that in light of *Campbell* v. *United States*, 83 S. Ct. 1356 (1963), the *Genovese* case should be remanded to the Court of Appeals for the Second Circuit for further reconsideration on the question of the Government's failure or refusal to produce notes of an interview with a Government witness. In the *Campbell* case,

supra, this Court vacated the judgment of the Court of Appeals, First Circuit, and the judgment of conviction, and remanded the case for further proceedings consistent with the majority opinion. In the *Bentvena* case, currently pending before this Court on a petition for certiorari, the Government's witness, former F. B. I. Agent Rowan, admitted destroying his notes of the principal Government witness, a special employee, "to circumvent the Jencks decision" (see page "34" of Petition for a Writ of Certiorari as respecting petitioner Galante).

In the case at bar, petitioner Cardillo assigned as error the point that he was deprived of a fair trial by reason of the improper restriction of the cross-examination of the principal prosecution witness. This error occurred on two separate occasions during the trial: a) when the Trial Court instructed Government witness Ohrynowicz regarding the scope of his privilege against self-incrimination, and, b) when the Trial Court sustained prosecution's objections to defense counsel's interrogatories propounded to the said Government witness. Petitioner was the sole appellant who requested the Court of Appeals to examine the statements by Government witnesses that were not turned over to the defense pursuant to their request under Title 18, U. S. C. §3500, but which were presented to the Trial Court for *in-camera* inspection. Notwithstanding the Court of Appeals, Second Circuit, finding that after their examination of these statements the defense was not entitled to their production, it is respectfully submitted that in the light of *Genovese*, *supra*, a reexamination by this Court of the instant case should reveal that the petitioner was entitled to have these statements turned over to the defense for they came within the purview of §3500 of Title 18, U. S. C.

Petitioner's trial counsel was unduly and seriously impeded by the Trial Court when the Court volunteered advice to the principal prosecution witness to the effect that he may curtail the cross-examination by seeking refuge behind the shield of the Fifth Amendment which was improperly extended to him.

In a more recent case, *Goldstein* v. *United States*, Docket No. 28207, decided October 22, 1963, the Court of Appeals for the Second Circuit wrote a *per curiam* opinion:

> "We need not decide whether if Goldstein had taken the stand to rebut the inference of knowledge which his counsel might have expected the judge to allow the jury to draw from possession of goods that were in fact illegally imported, he might still be able to argue that his conviction was obtained through testimony that, on his view of the statute was *unconstitutionally compelled*; since he remained silent, it is clear that he lacks standing even on such a basis." (Emphasis supplied.)

In *Goldstein*, *supra*, the Court of Appeals rejected his contention that testimony was presented against him in violation of his constitutional rights. The Court's ruling was that since he failed to take the stand he could not be heard to complain of the unconstitutionally compelled testimony. In the case at bar, the defense timely and properly objected to the apparently erroneous rulings of the Trial Court, but these objections, too, were cast aside.

Similarly, petitioner was denied the right to the testimony of the Government's chief witness against him because said witness claimed his Fifth Amendment privilege during his cross-examination testimony against petitioner and, even then, the privilege was claimed at the Trial

Court's suggestion. All of this was violative of due process of law and in conflict with the decisional precedents of the respective Court of Appeals' Circuits.

CONCLUSION

For the foregoing reasons, it is respectfully urged that this petition for a rehearing be granted, and that, upon further consideration, a writ of certiorari issue to the United States Court of Appeals for the Second Circuit.

s/ FRANCES KAHN
Counsel for Petitioner
John Cardillo

Certificate of Counsel

I, FRANCES KAHN, counsel for the above-named petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay nor for any ulterior purpose, and that it is restricted to the grounds specified in Rule 58, subdivision 2, of the Rules of this Court.

s/ FRANCES KAHN
Counsel for Petitioner

Dated: October 30, 1963.